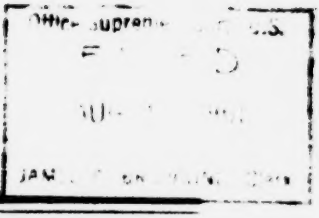

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1961.

No. 31

MISSISSIPPI VALLEY BARGE LINE COMPANY,
Petitioner,

versus

INLAND WATERWAYS SHIPPERS ASSOCIATION and
L. B. FOSTER COMPANY,
Respondents.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1961.

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MISSISSIPPI VALLEY BARGE LINE COMPANY,
Petitioner,

versus

INLAND WATERWAYS SHIPPERS ASSOCIATION and
L. B. FOSTER COMPANY,
Respondents.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

Mississippi Valley Barge Line Company prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Eighth Circuit affirming a judgment rendered by the United States District Court for the Eastern District of Missouri in favor of respondents and against petitioner.

OPINIONS BELOW.

The opinion of the Court of Appeals (App. Infra, p. 1a) is reported at 289 F. 2d 374. The opinion and judgment of the District Court (R. 139-145) is not yet reported.

JURISDICTION.

The judgment of the Court of Appeals affirming the District Court was entered on April 26, 1961 (App. infra, pp. 15a-16a). A rehearing was timely applied for and was refused on May 22, 1961 (App. infra, p. 16a). The mandate of the Court of Appeals was sent down to the District Court on June 6, 1961.

Jurisdiction herein is invoked under the Act of June 25, 1948, c. 646, 28 U. S. C. 1254, 62 Stat. 928.

QUESTIONS PRESENTED FOR REVIEW.

I.

May a common carrier by water, subject to Part III of the Interstate Commerce Act, which issues a bill of lading and promulgates a tariff (filed with and approved by the Interstate Commerce Commission) whereby it places upon a shipper the duty of loading and stowing cargo in an unmanned, non-self-propelled barge, be held liable for damage to cargo resulting from the negligence of the shipper's agent in loading the cargo?

II.

May the Bill of Lading Act be read together with the Harter Act as compatible legislation so that the duty to load and stow cargo properly on an unmanned, non-self-propelled barge may be imposed on the shipper by the use of a "Shipper's Load and Count" bill of lading, or is the Bill of Lading Act meaningless in this context?

III.

May a District Court strike with nullity one provision of a regulated water carrier's bill of lading contained in a tariff duly filed with and approved by the Interstate Commerce Commission and affecting the entire rate struc-

ture of the carrier, or is jurisdiction vested in the Commission to act in the first instance to determine the validity of the challenged clause *vel non* and in its relation to other conditions of carriage?

STATUTES INVOLVED.

The Harter Act, Sections 1, 2 and 3, Act of February 13, 1893, c. 105, 27 Stat. 445, 46 U. S. C. 190, 191, and 192.[1]

The Bill of Lading Act, Section 21, Act of August 29, 1916, c. 415, 39 Stat. 541, 49 U. S. C. 101.[2]

The Interstate Commerce Act, Sections 306 (a) and 306 (c), Part III, Act of February 4, 1887, c. 104, Act of September 18, 1940, c. 722, Section 201, 54 Stat. 935, 49 U. S. C. 906.[3]

STATEMENT OF THE CASE.

This action was commenced as a classic suit for cargo damages and was originally brought in the Circuit Court for the City of St. Louis on February 15, 1957 (R. 1-3). The requisite jurisdictional amount being involved, the case was removed to the United States District Court for the Eastern District of Missouri, Eastern Division, on March 12, 1957, on the ground of diversity of citizenship (R. 6). It was divided into two counts, each count referring to a separate shipment (R. 1-3). This petition for a writ of certiorari to review the decision of the Court of Appeals for the Eighth Circuit is limited to the questions of law set forth above, all of which are presented by the Count 2 allegations and proof adduced in the District Court. No review of the Count 1 portion of the decision is sought.

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[1] Infra, p. 16a.

[2] Infra, p. 18a.

[3] Infra, p. 19a.

Petitioner, Mississippi Valley Barge Line Company (Valley), is a common carrier certificated by the Interstate Commerce Commission to transport general commodities between various points on the inland waterway systems in accordance with its Tariff on file with the Commission. Respondent, Inland Waterways Shippers Association (Inland), is a pool shipper—one which makes up full barge loads for its customers in order to take advantage of maximum load barge rates (R. 45, 46). Respondent, L. B. Foster Company (Foster), is one of Inland's customers.

Foster is a pipe sales company located at Houston. It bought some new 16 inch pipe from Youngstown Sheet and Tube Company at Youngstown, Ohio, f. o. b. cars at the mill, and directed that the pipe be shipped to it by rail at Pittsburgh in care of Inland (R. 46). The latter company then contacted Valley and arranged for it to move the shipment, with shipments of its other customers, on a barge from Pittsburgh to Houston (R. 50, 99).

Valley does not hold itself out as having, and in fact does not have, loading facilities, or terminal, and does no stevedoring at Pittsburgh (R. 84, 95). Its Tariff requires loading, stowing and discharging of all shipments to be handled by the shipper at the shipper's cost. Its bill of lading form, quoted in full in its Tariff, recites that the shipments have been loaded and counted by the shipper. When contacted by a prospective shipper, the shipper is advised of this (if that fact is not already known) (R. 95). In the instant case, since Inland and Valley had done business over a long period of time, the Houston Manager of Inland wired the Manager of Marion Coal and Transfer Company at Pittsburgh and advised him of the contemplated shipment, and Valley's General Freight Agent at Pittsburgh was then notified by Marion as Inland's agent to spot a non-self-propelled, unmanned barge at Marion's dock (R. 99). Marion is an independent terminal

operator having no connection with Valley by stock ownership, directors, officers, employers, or otherwise.

Marion loaded the barge with 22 lots of steel weighing approximately 1030 tons for account of a dozen of Inland's customers (R. 77). During the loading operation, no representative of Valley was present, and all charges of Marion for loading the cargo were billed directly to and paid by Inland (R. 51, 57, 87).

A Valley towboat picked up the barge and towed it down-river as a routine matter to Owensboro, Kentucky, where it was spotted, on orders of Inland subject to Tariff provisions for stop-off to complete loading, at the plant of Green River Steel and Supply Company. That company then loaded on the barge an additional 43 tons of steel billets (R. 75, 92). As in the original loading, Green River had no connection in any way with Valley, and acted for and was paid by Inland.

On outturn of the pipe at destination (Houston), it was found to have been dented over large areas. The District Court found (and the finding is supported by the record) that the pipe had been damaged by improper stowage, in that heavy steel bars and tubing had been loaded on top of the pipe by Marion at Pittsburgh (the nature of the damage left no doubt that it was caused by the top loading of the pipe in Pittsburgh or the billets at Owensboro) and that the weight of the heavy cargo on the pipe had crushed it and caused the damage (R. 143). Petitioner accepts this finding, both as to the cause of the loss and the amount thereof.

In addition to the rate schedules for transporting hundreds of commodities between various points, Valley's Tariff 25-C, I. C. C. No. 101 incorporates the terms and conditions of its bill of lading which was used in connection with the movement under consideration. In brief,

Item 700,[4] quoted in the bill of lading, provided that Valley would assume liability for all damages to shipments which it moved, including those arising from marine perils, Acts of God, fire, general average and salvage; it excepted, however, loss or damage caused by reason of improper stowage, insufficiency of packing and other causes attributable solely to the shipper's acts or the inherent nature of the cargo. The bill of lading shows on its face that it is a "Shipper's Load and Count" lading (R. 75). Since the shipper and the consignee named in the bill of lading were one and the same, and since the bill of lading was a straight bill of lading, no rights of third parties have intervened and no estoppel as against the carrier can arise.

The record herein, therefore, presents a simple case involving a claim for recovery of damage to cargo caused by the negligence of the cargo owner in improperly stowing the cargo. The District Court and the Court of Appeals held that the Harter Act requires the carrier to load and stow the cargo, and visited liability on the carrier for the negligent stowage, this holding being made in the face of the rate structure which was approved by the Interstate Commerce Commission, and which does not contemplate that the carrier has any duties or responsibility for the loading, stowage or discharge of the cargo. The holding of the Courts below likewise negates the possibility of using a "Shipper's Load and Count" bill of lading in connection with water transportation, although the Bill of Lading Act clearly makes no distinction between rail, motor, and water transportation, and clearly authorizes the use of this type of bill of lading; and finally the holding of the Courts below substitutes the judgment of the court for that of the Interstate Commerce Commis-

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[4] The pertinent portion of § 10 of the bill of lading which also refers to Item 700 of the Tariff is quoted infra, p. 21a.

sion in the broad field of rate structures and conditions of carriage which materially affect the transportation policies of the entire country.

REASONS FOR GRANTING THE WRIT.

I.

Although the amount involved in this case is of no great moment,[5] the principle for which it stands is of transcendent importance to petitioner and the transportation industry of which it is a part. It is, of course, recognized that the Harter Act, when applied to ocean carriage, has been interpreted consistently by the courts as requiring a shipowner to be responsible for the loading and stowing of cargo, and has imposed liability on the shipowner in the event that he is negligent in stowing and caring for cargo entrusted to his custody. This, however, is a far cry from holding that a shipowner is responsible for a cargo owner's negligence in handling and stowing his own cargo.

This is not a case where the vessel or barge was unseaworthy or where any conceivable negligent act of omission or commission on the part of the barge operator gives rise to the claim. In this case, the owner of the barge did not even see the cargo, and the damage in all probability existed prior to the time that the barge left the landing at Pittsburgh, before any Valley employee knew that her loading was completed.

The Court of Appeals has unanimously held that Valley as a common carrier by water was "under a legal duty to properly stow, care for and deliver the two shipments", and that its "attempt to relieve itself of the obligations 'to carefully handle and stow (the) cargo and to care for * * * (the) same was without legal effect' (App. infra, p. 15a). The basis for this holding was terra

[5] The judgment on Count 2 was for $2,086.84 with interest

neously, we submit) the Court's interpretation of Section 1 and Section 2 of the Harter Act, and the question is immediately presented whether these prohibitory sections of the Harter Act are self-operative: is there an "obligation" on the part of a river carrier to load cargo for a shipper? It is our submission that where the barge owner is in fact not negligent, and where the barge owner has no obligation to load or care for cargo, clauses limiting liability are not violative of the Statute and that the carrier would not be liable even in the absence of the clauses.

The very nature of barge carriage in the Mississippi River clearly shows that there is and could be no cargo handling or stowage or discharging obligation on the part of the barge owner. River transportation, as Your Honors know, has grown of age in recent years, and millions of tons of freight are moved on the inland waterways system. Transportation is accomplished by tows which move as much as four Liberty ships. A forty barge tow, each of the barges containing cargo weighing 600 or 800 tons, is a common occurrence on the Mississippi. Towboats with 8500 horsepower built at a cost in excess of a million dollars move these huge tows.

A tow is often brought downriver in a manner so that one or more barges can be dropped off or added without even stopping the tow. For example, if a barge loaded with grain is moving from Cairo, Illinois, to Memphis, Tennessee, in a tow destined for New Orleans, a small tug may meet the tow in mid-stream and take the barge out of the tow and bring it in to a Memphis elevator, or may add another barge to the tow, which might be too unmaneuverable or unwieldy to land at the facility to which the barge is destined. It often happens, as in the case before Your Honors, that a barge will be stopped off at a place where there is no facility other than a single plant, like Green River Iron & Steel Company at Owensboro, or a barge may be spotted at an elevator at St. Louis or

a sugar refinery near New Orleans for loading by the shipper. The very nature of the business indicates, we submit, that there can be no imposition of an obligation on the part of a barge owner to load, stow or discharge cargo.

It would, of course, be proper to charge a barge owner with liability for negligence in cargo handling if the barge owner in fact handled the cargo. Where the cargo is not handled by the barge owner, however, and where the shipper or shipper's agent undertakes the duty of loading and stowing or discharging, the historic duty which might exist on the owner of an ocean-going ship to load, stow and discharge simply does not exist.

We submit that the language in the many cases involving the imposition of liability on a shipowner for cargo damage due to improper stowage for the most part can be limited to the facts there present. In the case of an ocean-going ship which might have a manifest of hundreds of items of general cargo for hundreds of consignees, it would never do for each consignee to be responsible for the loading, stowing and discharging of his own shipment. On the other hand, how could a shipper be held responsible for the proper ventilation of a cargo on board a ship at sea? Obviously this is a direct responsibility of the shipowner, and so, too, is it a direct obligation of the shipowner to see that pig iron is not stowed on top of a cargo of eggs. Moreover, a shipowner must know his own vessel, and he must accept responsibility for cargo which is damaged due to stowage in a dirty compartment, for example.

Such is not true, we submit, in the case of a rail carrier or an inland water carrier where the shipper assumes the responsibility of loading. If a railroad car is spotted at a private industry track and is sealed after it has been loaded by the consignor, the rail carrier is not responsible for improper bracing of the cargo. The identical situation

holds true in the case of a river carrier who spots an empty barge at the consignor's plant and who takes the barge away, loaded, when it is sealed (in the case of a covered barge) just as is a rail car, or when it is loaded in such a way that it would be impossible for the carrier to see the under stowage and to determine if the lower tiers of the cargo were properly dunnaged and braced or were being crushed.

The decision of the Court below has achieved an improper result because the consignor has profited by his own wrongdoing. Obviously the act of the agent is the act of the principal, and if recourse is to be had by the consignor for the damages sustained, that recourse lies against his own agent, Marion, who improperly loaded and stowed the cargo. Recourse should not be had on the carrier, and there is nothing in the Harter Act, we submit, which would indicate that the carrier is required to pay the claim.

II.

Section 21 of the Bill of Lading Act[6] authorizes the use of a "Shipper's Load and Count" lading. That Act is clearly applicable to all common carriers whether rail, motor or water. (See Section 1 of the Act, 49 U. S. C. 81.) The rights or obligations of a carrier who does not load cargo are clearly delimited by Section 21 of the Act, which provides in unequivocal terms that when a bill of lading is endorsed to indicate that the shipper rather than the carrier has loaded, weighed and counted a shipment, the carrier is not liable for damages "caused by the improper loading" of the goods described in the bill of lading.

It is our submission that the carrier in this case simply followed the terms of Section 21 of the Bill of Lading Act and carried into its Tariff the statutory right accorded by the Act to absolve itself from liability for improper load-

[6] Quoted infra, p. 18a.

ing where that loading is performed by the shipper. The Court of Appeals glossed over the argument presented to it on this question for the reason that the reliance of Valley on the Bill of Lading Act "flies in the very teeth of the prohibitions of the Harter Act" (App. infra, pp. 12a-13a). It is submitted, however, that there could be no reason for the inclusion of all transportation within the provisions of the Bill of Lading Act unless water transportation was intended. Certainly the Harter Act, which had been law for 25 years, could not have been overlooked by Congress in 1916 when it enacted the Bill of Lading Act, and if the obligation of safe stowage may not be shifted to the shipper by a water carrier, an exception would have been carried into the Bill of Lading Act. This Court does not seem to have passed upon the point, but at least the Act was held to apply to water carriers by Judge Walsh in the Southern District of New York in **Toho Bussan Kaisha, Ltd. v. American President Lines, Ltd.**, 155 F. Supp. 887. It seems obvious that there are cases where a common carrier by water properly may use a "Shipper's Load and Count" lading, and we submit that there is no reason why the situation presented by this record is not one of those cases. The effect of the opinion of the Court of Appeals here is to write Section 21 of the Bill of Lading Act off the books.

III

Being a common carrier by water subject to Part III of the Interstate Commerce Act, Valley was required to file and did file a Tariff with the Interstate Commerce Commission in which the conditions governing the carriage of shipments were spelled out in detail. Chief among the conditions pertinent to the instant case is the condition in Section 16 of the bill of lading, which provides that Valley shall not be liable for improper stowage (App. infra, p. 21a). It is to be remembered that this term is

used in the context of having the shipper do its own stowage, and the bill of lading so provides.

The bill of lading expressly provides that the carrier waives the benefits of the Harter Act and the Limitation Act and assumes liability for damaged cargo occasioned by Acts of God and all other risks other than those specially excepted (App. infra, p. 21a). In other words, the carrier went far beyond its legal responsibility in assuming those extraordinary risks which generally fall upon a shipper.

It is our submission, of course, that the degree of liability of the carrier governs the level of its rates, and where important conditions of carriage such as are involved in the instant case are changed, the entire rate structure is changed. The assumption of liability by the carrier for Acts of God and for negligent navigation, coupled with the waiver of the benefit of the Limitation Acts, and further coupled with the assumption of liability for all losses of, damage to or expenses in connection with the shipment (other than from those excepted causes which are in the nature of areas controlled entirely by the shipper) certainly places the shipper in a much better position than a shipper on an ocean going vessel. These risks which are assumed by the carrier are those which customarily are protected by cargo insurance, and it was the intention of the regulated river carriers (all of whom have substantially similar Tariffs to that involved here) to bring themselves to a point where they could be competitive with rail and motor carriers in order to attract freight movements to their lines.

It is to be seen, therefore, that the position of the respondents which was adopted by the Courts below to the effect that the requirement that the shipper load and stow his own cargo, does not stand alone and should not be lifted out of context. This provision simply falls into the

overall policy of the barge lines to place upon a shipper the responsibility for areas over which the shipper has complete dominion and control in exchange for a broad assumption of liability by the carrier far beyond that imposed by law. This type of arrangement, embodied in the Tariff, has been held by the Court below to be improper, and without reference to the regulatory body which approved the rate structure. In support of its conclusion, the Court below relied on the decision of this Court in **Southwestern Sugar and Molasses Company v. River Terminals Corporation**, 360 U. S. 411, 79 S. Ct. 1210. We submit that this decision, far from supporting the conclusion of the Court, is diametrically opposed to that conclusion.

In **Southwestern Sugar**, the case of **Boston and Maine R. R. v. Piper**, 246 U. S. 439, 38 S. Ct. 354 involving a determination by the Court in the first instance that a provision in a Tariff was invalid, was distinguished because the clause there involved was specifically declared illegal by the Interstate Commerce Act itself. The direct holding of **Southwestern Sugar**, however, was

> "that the exculpatory clause here at issue should not be struck down as a matter of law, and that the parties should be afforded a reasonable opportunity to obtain from the I. C. C., in an appropriate form of proceeding, a determination as to the particular circumstances of the tugboat industry which lend justification to this form of clause if any there be or which militate towards a rule wholly invalidating such provisions regardless of the fact that the carrier which seeks to invoke them is subject to prospective and retrospective rate regulation. 'Cases are not decided nor the law appropriately understood apart from an

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See Brief for United States, pp. 36-41, 360 U. S. 411, 79 S. Ct. 1210.

informed and particularized insight into the factual circumstances of the controversy under litigation.' **Federal Maritime Board v. Isbrandtsen Co.**, 356 U. S. 481, 498, 78 S. Ct. 851, 861, 2d Ed. 2d 926. This principle has particular force when the courts are asked to strike down on grounds of public policy a contractual arrangement on its face consensual."

The fact that the clause under consideration in the above quotation was attacked from a public policy point of view rather than one involving statutory interpretation does not change the thrust of the holding, for, as has been said on numerous occasions, "Tariffs bind both carrier and shipper with the force of law." **Lowden v Simonds-Shields-Lonsdale Grain Co.**, 306 U. S. 516, 523, 59 S. Ct. 612, 614, 83 L. Ed. 953.

CONCLUSION.

For the reason assigned, it is respectfully submitted that this petition for a writ of certiorari to review the decision of the Court of Appeals for the Eighth Circuit should be granted and that the judgment of that Court, affirming the District Court, should be reversed.

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OPINION OF COURT OF APPEALS.

UNITED STATES COURT OF APPEALS
for the Eighth Circuit

No. 16,587

Mississippi Valley Barge Line Company, Appellant, vs. Inland Waterways Shippers Association, Inc., a Corporation, et al., Appellees.	Appeal from the United States District Court for the Eastern District of Missouri.

[April 26, 1961.]

Before SANBORN, VAN OOSTERHOUT, and MATTHES, Circuit Judges.

MATTHES, Circuit Judge.

This action for damage to goods shipped on two separate occasions was instituted in two counts in the Circuit Court of the City of St. Louis, Missouri, and because of diversity of citizenship and the amount involved, was removed by the defendant Mississippi Valley Barge Line Company, hereinafter referred to as "Valley" or "appellant", to the United States District Court, where, on trial by the court, a judgment was rendered in favor of plaintiffs on Count I in the amount of $3,386.31 and interest, and on Count II in the amount of $2,986.84 and interest.

On this appeal we have for disposition the primary question of whether plaintiffs, under the relevant undisputed facts and under controlling legal principles, are barred from recovery.

Valley is a common carrier by water and operates barges in the transportation of property. Plaintiff L. B. Foster Company, hereinafter called "Foster", purchased 620 bundles of new, galvanized iron prime fence pipe and employed plaintiff Inland Waterways Shippers Association, Inc., hereinafter called "Inland" (Foster and Inland, sometimes referred to as "appellees") to arrange for the transportation of the pipe from the manufacturer's plant in Pennsylvania to Foster's plant in Texas, and Inland, in turn, made arrangements for river shipment with Valley.

This pipe, which is the subject of Count I, was transported by rail from Sharon to Pittsburgh, Pennsylvania. Valley maintained no loading facilities at Pittsburgh and the actual loading was done by Marion Coal and Transfer Company, whole loading terminal was opposite Valley's fleet at the river in Pittsburgh. When a shipper had no loading terminal at Pittsburgh, Valley would notify Marion, and Marion would contact the shipper and make proper arrangements to act as stevedores. The shipper paid Marion's charges. In July of 1954, this pipe was loaded in Barge CTC-412, an open hopper type, by Marion. Valley's general freight agent at Pittsburgh testified that the barge was properly loaded "or we wouldn't have taken it out." Valley made up a loading diagram showing the position of the pipe after it was loaded on the barge. The 620 bundles were designated as Item 7, and constituted only a part of the entire cargo. On July 14, 1954, while the barge was being loaded, Valley's Pittsburgh office received a telegram from Valley's Houston, Texas office, advising that the barge was to stop at Cincinnati for additional tonnage. No covering was placed over the

cargo in the barge and it was exposed to the weather. However, it was customary to ship galvanized pipe uncovered as it is not susceptible to damage from exposure to the elements.

Barge 412 as loaded by Marion, was moved by Valley to Cincinnati, where it was placed at Valley's own terminal and on July 27, 1954, under the personal direction and supervision of Valley's terminal manager, 281,990 pounds of old, rusty, muddy, dirty pipe were loaded and stowed by Valley on Barge 412, and admittedly a portion thereof was placed above and on top of the new galvanized pipe. This scrap pipe had been purchased by Foster at Cincinnati and was to be delivered to Foster in Texas. Valley placed no covering over the new pipe prior to placing the old and rusty pipe on the barge. The barge with its entire cargo exposed to the elements was then transported to New Orleans, Louisiana, arriving there August 10, 1954. During this transportation, at least one heavy rain fell. Another carrier transported the new pipe from New Orleans to Houston, Texas, where it was unloaded, placed on a Missouri-Pacific railroad car and moved about 16 miles to the Pasadena Fence Company of Pasadena, Texas, which had purchased it from Foster while the shipment was en route. While the pipe was being transferred from the railroad car to trucks for further delivery, it was discovered that the galvanized pipe was damaged by stain caused by rust drippings. Pasadena refused to accept the shipment in the damaged condition and Foster was required to and did expend $3,386.31 in re-galvanizing the pipe. In summary, the foregoing constitutes the factual basis for Count I.

Count II grows out of the transportation by Valley of 10,000 feet of new prime electric-weld steel pipe purchased by Foster from Youngstown Sheet and Tube Company of Ohio in 1955. Again Inland was employed to arrange for transportation from the manufacturer's plant to Foster in

Houston, Texas, and Inland made all arrangements with Valley for river shipment. The pipe was loaded by Marion Coal and Transfer Company from railroad cars at Pittsburgh, Pennsylvania, into Valley's barges. Lot 9, consisting of 29 pieces of pipe, Lot 10—35 pieces, and Lot 11—29 pieces, the lots which turned out damaged, were, according to Valley's barge loading diagram, placed in Barge MV-618. This loading diagram shows no damage to any of the cargo at the time of the loading, except Lot 20, owned by other parties not involved in this action, which, according to the diagram, showed "bent tubing humped." Barge 618 was moved by Valley to Owensboro, Kentucky, where an additional 96,820 pounds of iron or steel billets were placed on board the barge, but the position of these iron or steel billets in the barge is not clear from the record. The loading diagram does reveal, however, that Lots 12 and 13, also the property of other parties, weighing a total of 204,090 pounds and including 22 bars weighing 4,209 pounds each, were placed immediately on top of Lots 9, 10 and 11, in Barge 618.

Barge 618 arrived at New Orleans, Louisiana and on June 9, 1955, it was transported from there to Houston, Texas, by another water carrier, where the cargo of pipe was placed on railroad cars and moved to Foster's plant. Upon arrival there, it was inspected and long dents were found in the walls of 43 pieces of pipe. The dented pipe was unusable and it was sold for scrap, resulting in a loss of $2,986.84, the amount of appellees' claim as incorporated in Count II of the complaint.

Three principal points were advanced in brief by appellant: Point I, "The Court erred in overruling defendant's motion for a judgment at the close of all the evidence"; Point II, "The exceptive clauses in the bill of lading validly exculpate Valley from liability herein"; Point III, "The Court erred in ruling that defendant had a common

law and statutory duty to properly load, stow, and discharge the cargo."

Three contentions are made to support Point I: (a) that appellees failed to meet the burden of proving damage to the shipment on outturn; (b) appellees failed to prove the shipments were in good order and condition at the time they were received by Valley; (c) the carrier is not liable where improper loading of barge is done by the shipper under a "shippers load and count" bill of lading.

There is no question of appellees' burden of proof. Concededly, in order to present a prima facie case, appellees here were required to establish that the goods were handed over to Valley in good condition and outturned in a damaged condition. Valley's contentions of error in this regard turn simply on questions of fact. Under this circumstance, the findings of the trial court cannot be disturbed on appeal unless they are shown to be clearly erroneous. Rule 52(a) Federal Rules of Civil Procedure; *Cleo Syrup Corporation* v. *Coca-Cola Co.*, 8 Cir., 139 F. 2d 416, 417, 418, cert. den. 321 U.S. 781; *Pendergrass* v. *New York Life Ins. Co.*, 8 Cir., 181 F.2d 136, 137, 138. The record conclusively convinces that there was adequate factual support for the trial court's finding that both shipments were in good condition and order when received by Valley and that they were damaged as claimed on outturn.

The galvanized iron fence pipe, subject of Count I, was new and had been purchased from a reputable manufacturer; the damage resulted from rust drippings and rust stains—not from rusting of the pipe. The loading diagram prepared by Valley contained no notation that the pipe was damaged in any respect when received and placed on the barge. Scrap pipe was loaded on Barge 412 by Valley above and on top of the new galvanized pipe, which was not protected by covering or otherwise. Atmospheric

condition, such as dew, rain and fog, while the pipe was on the barge, were such as to cause rust to drip from the old pipe upon the galvanized pipe. An expert witness was of the opinion that the rust stains occurred while the pipe was in possession of Valley. Except while the galvanized pipe was on Valley's barge, it was not susceptible to rust stains as it was the only cargo on railroad cars.

The contention respecting the large steel pipe, subject of Count II, is equally untenable. The pipe was new when purchased. Valley made no record on the loading diagram that the pipe was dented or damaged as was done with respect to Lot 20 (not involved here). The testimony of Valley's own expert witness convincingly refutes any argument that the pipe was not received in good condition or that it was not damaged when outturned. Mr. Schiffman, Vice-President of St. Louis Terminal Distributing Company, an expert in matters of barge-loading, after examination of the diagram showing the manner of stowing the cargo in Barge 618, and being apprised of relevant facts, was of the opinion that the dent damage possibly resulted from the placing of Lot 12, consisting of 22 bars weighing 92,610 pounds (each bar weighing in excess of 4,000 pounds) on top of Lots 11, 10 and 9, the steel pipe here involved.

The fact that no witness testified directly that the shipments were in good condition when received does not, in view of the strong circumstantial evidence present, effectively detract from the court's finding. See *California Packing Corp.* v. *States Marine Corp. of Del.* (N.D. Calif.), 187 F.Supp. 540, 542-543; *Warner Barnes & Co.* v. *Kokosai Kisen Kabushiki Kaisha (The Glasgow Maru)*, 2 Cir., 102 F.2d 450; *McNeely & Price Co.* v. *Ellerman & Bucknall S. S. Co.* (D. Pa.), 100 F.Supp. 339; *John R. Evans & Co.* v. *The Express* (D. Pa.), 100 F.Supp. 347; *United States* v. *Apex Fish Co.*, 9 Cir., 177 F.2d 364; and compare,

McNeely & Price Co. v. *The Exchequer* (D. Pa.), 100 F. Supp. 342.

Subsidiary contention (a) of Point I and Points II and III, viewed collectively, rest upon the premise that a third party, Marion Coal and Transfer Company, did the physical loading of appellees' goods involved in both shipments; that in so doing Marion was acting as the agent for the shipper, and that the proximate cause of the damage was loading in a negligent manner by shipper which relieved Valley of liability for the damage. In effect, Valley's argument is founded upon three alternative propositions: first, that it never had a duty to load or stow the cargo either under the common law or by statute; secondly, that appellees effectively and affirmatively assumed this duty under the shipper's load and count bill of lading; and thirdly, that certain provisions appearing on the reverse side of Valley's bill of lading and incorporated in its tariff, effectively exculpate Valley from damages caused by improper loading or stowage.

It is necessary to first carefully define the area of law which must govern resolution of the issues presented on this appeal. Of primary importance is the fact that Valley was carrying the goods here involved under a contract of affreightment; it was acting as a common carrier by water. Hence, we need not concern ourselves with consideration of duties and liabilities springing from contracts of mere towage alone, or from charter arrangements between parties. See *Oxford Paper Co.* v. *The Nidarholm*, 282 U.S. 681; *Sacramento Nav. Co.* v. *Salz*, 273 U.S. 326; *The Steamer Syracuse*, 79 U.S. 167, 171; *Bisso* v. *Inland Waterways Corp.*, 349 U.S. 85; *S. W. Sugar Co.* v. *River Terminals*, 360 U.S. 411; *The Coastwise*, 1 Cir., 233 F. 1, 4; *Baltimore & Boston Barge Co.* v. *Eastern Coal Co.*, 1 Cir., 195 Fed. 483, 485; *Mississippi Valley Barge Line Co.* v. *T. L. James & Co.* (E.D. La.), 144 F.Supp. 662, aff'd, 244 F.2d 263, cert. den., 355 U.S.

871; 48 Am. Jur. Shipping 323; Gilmore & Black, "Law of Admiralty," 1957, at p. 215 et seq.

At common law, a common carrier of goods by water was almost an insurer, being absolutely responsible for the safe arrival of cargo, unless the loss or damage was caused by an Act of God or of the public enemy, or by the inherent vice of the goods or the fault of the shipper, and even when the loss was caused by one of these, the carrier had to be free from negligence. *Propeller Niagara v. Cordes*, 62 U.S. (21 How.) 7, 23; *The Willdomino*, 3 Cir., 300 F. 5, 9, aff'd, *S. S. Willdomino v. Citro Chem. Co.*, 272 U.S. 718; Gilmore and Black, "The Law of Admiralty," supra, at p. 119. As bills of lading came into general use, water carriers began to insert various exculpatory clauses exempting them from liability for certain types of damage and eventually the bills came to include the exemption of the carrier even for damage resulting from its own negligence. Such negligence exemptions were generally upheld by the British courts, while the federal courts of the United States struck them down as being against public policy. See *The Delaware*, 161 U.S. 459, 471-474; *Liverpool Steam Co. v. Phenix Ins. Co.*, 129 U.S. 397, 437-463.[1] This was the historical setting which led to passage of the Harter Act of 1893, 27 Stat. 445, 46 U.S.C.A. §§190-196, designed to afford the cargo interests some protection against the exculpatory clauses and at the same time to permit the carriers to avoid liability under certain circumstances. Subsequently, and in 1936, the Carriage of Goods by Sea Act, 49 Stat. 1207 et seq., 46 U.S.C.A. §§1300-1315 (Cogsa), was enacted, supplanting the Harter Act in some respects.

We first give consideration to the design and purpose of the Harter Act which concededly is applicable to the

[1] Much of the background and historical material may be found in Gilmore and Black, supra, "The Law of Admiralty"; see, also, 48 Am. Jur., Shipping, §§ 381, 465

water carriage here involved. This statute does not lay down positive rules of law as to duties, responsibilities or liabilities—it does not impose any affirmative obligation on carriers. It simply forbids certain stipulations in the bills of lading. Since portions of the Act are of major importance in resolving the instant case, it is expedient that we set out the applicable provisions at some length:

"§ 190. Stipulations relieving from liability for negligence.

"It shall not be lawful for the . . . owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant, or agreement whereby it, he, or they shall be relieved from liability for loss or damage arising from *negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge.* Any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect." (Emphasis supplied).

"§ 191. Stipulations relieving from exercise of due diligence in equipping vessels.

"It shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent, or manager, to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of said vessel to exercise due diligence [to] properly equip, man, provision, and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents, or servants *to carefully handle and stow her cargo and to care for and prop-*

erly deliver same, shall in any wise be lessened, weakened or avoided." (Emphasis supplied).

Section 192 of the Act was designed to be a concession to the carriers, relieving them of strict common law liability. It provides:

> "If the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel nor shall the vessel, her owner or owners . . . be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service."

Although Cogsa is not here applicable since admittedly it applies only to shipments by sea to or from ports of the United States in foreign trade, we nevertheless refer briefly to portions thereof in order to intelligently consider and discuss Valley's position. In contrast to the Harter Act, Cogsa, in regulating bills of lading, imposes certain positive responsibilities and liabilities upon the carrier and ship, including among others §1303(2), that the carrier "shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried." Thus, in considering Harter and Cogsa, it will be seen that Cogsa imposes an affirmative duty to use care in respect to the cargo while Harter forbids stipula-

tions which eliminate the common law duty to exercise care in respect to the cargo. See *Gilmore* and *Black*, supra, at p. 127.

We now give attention to the stipulation found in the bills of lading covering the shipments herein and upon which Valley relies to escape liability. Appearing on the reverse of the bill covering the pipe, which is the subject of Count II, we find this language:

> "Sec. 10(a) . . . liability is assumed for general average, salvage charges and physical damages to or loss of the shipment howsoever occurring (including, but not limited to, fire, explosion, marine perils and Acts of God); *provided that the carrier shall not be liable for* delay in the delivery of the shipment, or for loss of, damage to, or any expense in connection therewith, caused directly or indirectly by or resulting from or arising out of: shrinkage, expansion, or other change due to natural causes; any vice or defect in the shipment (including country damage to cotton); the act or default of the shipper or owner; *insufficiency of packing; improper stowage, or the physical act of loading or unloading, when not performed by carrier. . . .*"[2] (Emphasis supplied).

In summary, Valley's position in relying upon this exemption is that the terms incorporated in its bill of lading are a part of its approved tariff and that such provisions, including a stipulation as to "shipper's weight, load and count," are all valid and in accordance with the Federal Bill of Lading Act, §21, 39 Stat. 541, 49 U.S.C.A. §101. Although conceding the applicability of the Harter Act, Valley advances the ingenuous argument that, inasmuch

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[2] There is some question raised as to changes in tariff provisions applicable to the two separate shipments, the main difference being that one tariff did not include the term "improper stowage." However, for the purposes of this opinion, we shall proceed on the theory that both bills of lading purported to except liability for improper stowage.

as this statute imposes no affirmative duties, in contrast to Cogsa, it never is under duty to load and stow the cargo, thus in effect arguing that it would only be unlawful and contrary to the statute to exempt itself from liability for improper loading and stowage if it had expressly stipulated, agreed to assume, and did assume, the duties of loading and stowage.

As we view the history of the Harter Act and the plain and explicit provisions thereof, we are satisfied and convinced that the voiding of exculpatory clauses for "negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery," encompassed in §190, and the provision of §191 making it unlawful to insert in any bill of lading any agreement "whereby *the obligations* of the master * * * to carefully handle and stow her cargo and to care for and properly deliver same, shall in any wise be lessened, weakened or avoided," presuppose an outstanding duty imposed by law in this regard. (Emphasis supplied). See, *The Germanic*, 196 U.S. 589, at p. 596, decided prior to Cogsa. Valley has not cited any case directly supporting its contention that it had no such duty. The cases upon which it places reliance involve private charter of vessels, or contracts of mere towage, where, by the terms of the contract, the shipper has undertaken the duties of loading, stowage, etc. See discussion and cases cited p. 8, supra. Likewise, of no persuasive consideration are cases involving rail carriers, frequently bringing into play a "shipper's load and count" bill of lading. See *Robinson* v. *New York Central R. Co.*, 282 N.Y.S. 877, aff'd, 270 N.Y. 659; *Perkel* v. *Pennsylvania R. Co.*, 265 N.Y.S. 597; *South Carolina Asparagus Growers' Ass'n* v. *Southern Ry. Co.*, 4 Cir., 46 F.2d 452; *Standard Hotel Supply Co.* v. *Pennsylvania R. Co.* (S.D.N.Y.), 65 F.Supp. 439, upon which Valley relies. Under the circumstances presented by this record, reliance upon a shipper's load and count bill of lading flies in the very

teeth of the prohibitions of the Harter Act, supra. We have been cited to no case sustaining such a bill of lading in the face of this statute, and our independent research has not revealed a case precisely in point although there are, of course, cases involving ocean going vessels arising before and after Cogsa which reiterate the proposition that a water carrier is liable for faults or omissions in regard to the loading, stowage and care of goods en route. See *United States* v. *Apex Fish Co.*, 9 Cir., 177 F.2d 364; *Schnell* v. *The Vallescura*, 293 U.S. 296, 305, 306; *General Foods Corporation* v. *The Troubador* (S.D.N.Y.), 98 F. Supp. 207, 210; *The Charlton Hall* (S.D.N.Y.), 285 F. 640; *The Germanic*, 196 U.S. 589; *Etablissements Edouard Materne* v. *The S. S. Leerdam* (S.D.N.Y.), 143 F.Supp. 367; and see *Mackey* v. *United States* (S.D.N.Y.), 83 F. Supp. 14, aff'd, 197 F.2d 241 (involving loss of goods before actual loading on board vessel). From these cases it readily appears that proper stowage of goods is of particular importance in water carriage, both for the seaworthiness and safety of the vessel, as well as for proper care of the goods en route. See *The Germanic*, supra, 196 U.S. 589, where it was found that negligent unloading so disturbed the center of gravity of the ship that it sank at the dock.[3] In the record before us there was evidence that Valley was much concerned with the supervision and problems of proper loading and stowage. One of Valley's agents testified that improper loading can result in a barge standing on end, or buckling. The significance of this matter was pointed out by another agent in these words:

> "But a hopper barge is particularly vulnerable to that type of loading because you haven't got the support. You have got to distribute your load even in loading. You have—now you have got three lots even

[3] In the opinion of the Lower court it appears that the master and crew of *The Germanic* had no actual part in the negligent unloading, since discharge of the cargo was effected and supervised by stevedores. See *The Germanic*, 2 Cir., 124 F. 1, pp. 6, 7

> in loading. You have to load it separately so as not to put an extra stress on a hopper barge."

The case of *Abbott* v. *Tompkins* (Ct. of Civ. App. of Tex.), 283 S.W. 647 (1926), is of particular interest, inasmuch as there, apart from the question of the Harter Act, the court discussed the duty of the barge owner under the common law for proper loading and stowage of cargo. The cargo there involved was rice and the loading was done by warehousemen acting as agents for the shipper. The jury found that the loading was negligently performed, in that the rice should have been stacked in pyramid form to shed water, and that this negligence was the proximate cause of the damage. In reversing the judgment for the carrier, the court observed, at p. 648:

> "Where the shipper assumes the duty of loading, the carrier may refuse to accept the goods for transportation when the loading is done in an improper or unsafe manner. If the carrier, with full knowledge of the manner in which the loading was done, does accept the shipment without objection, the shipper may assume that the manner of loading was satisfactory to the carrier."

As to the contention that the tariff provisions are valid until the Interstate Commerce Commission takes some action to disapprove them, it is clear to us that if the provisions of a tariff are in derogation of the Harter Act, they are invalid and unenforceable, even though embodied in the tariff, and no recourse need be had to the Interstate Commerce Commission before the court can act. See *S. W. Sugar Co.* v. *River Terminals*, supra, 360 U.S. 411, footnote 9 at p. 420; *Mississippi Valley Barge Line Co.* v. *T. L. James & Co.*, supra, 144 F.Supp. 662, at p. 667, 244 F.2d 263 at p. 267.

The argument is also advanced that the Harter Act has been modified by the provisions of the Bill of Lading Act, which was subsequently enacted. We are not so persuaded.

There is nothing in the latter statute to suggest that Congress intended to repeal the Harter Act provisions, and the two Acts may reasonably be read together as compatible legislation. See *Gardner* v. *The Danzler*, 4 Cir., 281 F.2d 719, 724-726.

In summary, we hold that Valley, acting here as a common carrier by water, and regardless of the actual extent of its supervision and control of Marion, was under a legal duty to properly stow, care for and deliver the two shipments; that the damage was proximately caused by negligence in these particulars; and that the attempt to relieve itself of the obligation "to carefully handle and stow [the] cargo and to care for * * * [the] same" was without legal effect.

The judgment is

Affirmed.

A true copy.

Attest:

Robert C. Tucker,

Clerk, U. S. Court of Appeals, Eighth Circuit.

(Seal)

JUDGMENT.

United States Court of Appeals
For the Eighth Circuit.

No. 16,587. September Term, 1960.

Mississippi Valley Barge Line Company,
Appellant,

vs.

Inland Waterways Shippers Association, Inc., a corporation, and L. B. Foster Company, a corporation.

Appeal from the United States District Court for the Eastern District of Missouri.

This Cause came on to be heard on the record from the United States District Court for the Eastern District of Missouri, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed.

April 26, 1961.

ORDER DENYING PETITION FOR REHEARING.

United States Court of Appeals
For the Eighth Circuit.

September Term, 1960.

Mississippi Valley Barge Line Company, Appellant, No. 16587. vs. Inland Waterways Shippers Association, Inc., et al.	Appeal from the United States District Court for the Eastern District of Missouri.

The Court has considered appellant's petition for rehearing and is of the opinion that the petition should be, and it is hereby, denied.

May 22, 1961.

Statutes.

The Harter Act, 27 Stat. 445 (1893), 46 U. S. C. 190, 191, 192, provides in pertinent part as follows:

Section 1.

"It shall not be lawful for the manager, agent, master, or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant, or agreement whereby it, he, or they shall be relieved from

liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge. Any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect."

Section 2.

"It shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent, or manager, to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of said vessel to exercise due diligence properly equip, man, provision, and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents, or servants to carefully handle and stow her cargo and to care for and properly deliver same, shall in any wise be lessened, weakened, or avoided."

Section 3.

"If the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel nor shall the vessel, her owner or owners, charterers, agent, or master be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality, or vice of the thing

carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service."

The Bill of Lading Act, 39 Stat. 541 (1916), 49 U. S. C. 101, provides in pertinent part as follows:

Section 21.

"When package freight or bulk freight is loaded by a shipper and the goods are described in a bill of lading merely by a statement of marks or labels upon them or upon packages containing them, or by a statement that the goods are said to be goods of a certain kind or quantity, or in a certain condition, or it is stated in the bill of lading that packages are said to contain goods of a certain kind or quantity or in a certain condition, or that the contents or condition of the contents of packages are unknown, or words of like purport are contained in the bill of lading, such statements, if true shall not make liable the carrier issuing the bill of lading, although the goods are not of the kind or quantity or in the condition which the marks or labels upon them indicate, or of the kind or quantity or in the condition they were said to be by the consignor. The carrier may also by inserting in the bill of lading the words 'Shipper's weight, load, and count,' or other words of like purport, indicate that the goods were loaded by the shipper and the description of them made by him; and if such statement be true, the carrier shall not be liable for damages caused by the improper loading or by the nonreceipt or by the misdescription of the goods described in the bill of lading: Provided, however, Where the shipper of bulk freight installs and main-

tains adequate facilities for weighing such freight, and the same are available to the carrier, then the carrier, upon written request of such shipper and when given a reasonable opportunity so to do, shall ascertain the kind and quantity of bulk freight within a reasonable time after such written request, and the carriers shall not in such cases insert in the bill of lading the words 'Shipper's weight,' or other words of like purport, and if so inserted contrary to the provisions of this section, said words shall be treated as null and void and as if not inserted therein."

The Interstate Commerce Act (1887), as amended, Part III, 54 Stat. 935, 49 U. S. C. 906, provides in pertinent part as follows:

Section 906.

"(a) Every common carrier by water shall file with the Commission, and print, and keep open to public inspection tariffs showing all rates, fares, charges, classifications, rules, regulations, and practices for the transportation in interstate or foreign commerce of passengers and property between places on its own route, and between such places and places on the route of any other such carrier or on the route of any common carrier by railroad or by motor vehicle, when a through route and joint rate shall have been established. Such tariffs shall plainly state the places between which property or passengers will be carried, the classification of property or passengers and, separately, all terminal charges, or other charges which the Commission shall require to be so stated, all privileges or facilities granted or allowed, and any rules or regulations which in anywise change, affect, or determine any part or the aggregate of such rates, fares, or charges, or the value of the service rendered to the passengers, shipper, or consignee.

"(c) No common carrier by water shall charge or demand or collect or receive a greater or less or different compensation for transportation subject to this chapter or for any service in connection therewith than the rates, fares, or charges specified for such transportation or such service in the tariffs lawfully in effect; and no such carrier shall refund or remit in any manner or by any device any portion of the rates, fares, or charges so specified, or extend to any person any privileges or facilities for transportation affecting the value thereof except such as are specified in its tariff: Provided, That the provisions of sections 1 (7) and 22 of this title (which relate to transportation free and at reduced rates), together with such other provisions of chapter 1 of this title (including penalties) as may be necessary for the enforcement of such provisions, shall apply to common carriers by water.

"(d) No common carrier by water, unless otherwise provided by this chapter, shall engage in transportation subject to this chapter unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this chapter. No change shall be made in any rate, fare, charge, classification, regulation, or practice specified in any effective tariff of a common carrier by water except after thirty days' notice of the proposed change filed and posted in accordance with this section. Such notice shall plainly state the change proposed to be made and the time when such change will take effect. The Commission may, in its discretion and for good cause shown, allow changes upon notice less than that herein specified, or modify the requirements of this section, either in particular instances or by general order applicable to special circumstances or conditions."

Miscellaneous.

Mississippi Valley Barge Line Company Freight Tariff, 25-C, I. C. C. 101, Item 700, as amended, provides in pertinent part as follows:

Section 10.

"(a) Subject to the limitations on recovery set forth in Section 2 hereof, liability is assumed for general average, salvage charges and physical damages to or loss of the shipment howsoever occurring (including, but not limited to, fire, explosion, marine perils and Acts of God); provided that the carrier shall not be liable for delay in the delivery of the shipment, or for loss of, damage to, or any expense in connection therewith, caused directly or indirectly by or resulting from or arising out of: shrinkage, expansion, or other change due to natural causes; any vice or defect in the shipment (including country damage to cotton); the act or default of the shipper or owner; insufficiency of packing; improper stowage, or the physical act of loading or unloading, when not performed by carrier; the authority of law, including, without limitation, quarantine and embargo; or the acts of the public enemy, hostilities or warlike operations, whether or not there be a declaration of war.

(b) Anything herein contained to the contrary notwithstanding, liability is assumed only for cargo safely aboard vessel when loading and or discharging is not performed by carrier.

(c) In connection with the assumption of liability herein provided for, the carrier expressly waives the benefit of any protection, limitation of liability or exemption accorded it by the Harter Act (Act of February 13, 1893, 46 U. S. C. 190 et seq.) and the Limited Liability Act of March 23, 1851 (R. S.) 4281 et seq., 46 U. S. C. 181 et seq.) and all acts amendatory thereof and supplementary thereto."

Office-Supreme Court, U.S.
FILED
SEP 11 1961
JAMES R. BROWNING, Clerk

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1961.

No. 305.

MISSISSIPPI VALLEY BARGE LINE COMPANY,
Petitioner,
versus
INLAND WATERWAYS SHIPPERS ASSOCIATION and
L. B. FOSTER COMPANY,
Respondents.

BRIEF

In Opposition to Petition for Writ of Certiorari.

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Federal Bill of Lading Act (1916), 39 Stat. 451, 49 U. S. C. A. 19, 20
49 U. S. C. A., § 101 .....19, 20
49 U. S. C. A., § 100 20

Other Authorities.

Gilmore & Black, The Law of Admiralty (1957) 9
53 Congressional Record 3934 20

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1961.

No. 305.

MISSISSIPPI VALLEY BARGE LINE COMPANY,
Petitioner,

versus

INLAND WATERWAYS SHIPPERS ASSOCIATION and
L. B. FOSTER COMPANY,
Respondents.

BRIEF

In Opposition to Petition for Writ of Certiorari.

JURISDICTION.

Rule 19 of the Revised Rules of this Court states that review on certiorari will be granted only where there are special and important reasons therefor. Respondents submit that this case does not present such reasons.

Because the Harter Act has been uniformly interpreted since 1893, without conflict of decision in any court, as imposing a non-delegable duty upon common carriers by water to properly load and stow cargo aboard its vessels and prohibiting these common carriers from avoiding liability for damage caused by improper stowage, and because the Interstate Commerce Commission is clearly without authority to repeal the Harter Act, this case presents only well-settled questions of federal law correctly decided below.

QUESTION PRESENTED.

Where merchandise was shipped from Pittsburgh, Pa., to the shipper in Houston, Texas, in a barge under contract of common carriage by water and the cargo was found damaged upon receipt by the shipper in Houston due to improper stowage of the common carrier's barge by an independent stevedore in Pittsburgh (and possibly also at Owensboro, Kentucky) at which points the shipper had no loading facilities, may the common carrier by water, who is admittedly subject to the Harter Act, which prohibits the carrier from avoiding its obligation to carefully handle and stow the vessel's cargo, escape liability thereunder by resorting to the device of filing a tariff with the Interstate Commerce Commission which provides that the stevedore is the agent of the shipper and that the common carrier by water shall not be liable for damage caused by improper stowage and then issuing a shipper's load and count bill of lading containing the same exculpatory language as to loading and stowing as contained in the tariff?

STATUTE INVOLVED.

The statutes involved are sects. 1, 2 and 4 of Harter Act (Act of February 13, 1893, c. 105, 27 Stat. 445, 46 U. S. C. A., §§ 190-191, 193). The Harter Act sets forth the duties, responsibilities, liabilities, rights and immunities of common carriers by water.

Section 1 of the Harter Act.

46 U. S. C. A., § 190. **Stipulations relieving from liability for negligence.**

It shall not be lawful for the manager, agent, master, or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant, or agreement whereby it, he, or they shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge. Any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect. Feb. 13, 1893, c. 105, § 1, 27 Stat. 445.

Section 2 of the Harter Act.

46 U. S. C. A., § 191. **Stipulations relieving from exercise of due diligence in equipping vessels.**

It shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent, or manager, to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of said vessel to exercise due diligence properly equip, man, provision, and

outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents, or servants to carefully handle and stow her cargo and to care for and properly deliver same, shall in any wise be lessened, weakened, or avoided. Feb. 13, 1893, c. 105, § 2, 27 Stat. 445.

Sect. 4 of the Harter Act (46 U. S. C. A., sect. 193) is set forth hereinafter at p. 21 of this brief.

STATEMENT OF THE CASE.

Respondents do not object to petitioner's efforts to state the facts as favorably as possible, but petitioner's "statement of the case", we believe, goes beyond this permissible limit. It not only omits certain significant facts found by the courts below, but it overstates certain facts, contains alleged facts not to be found in the record, and ends by asserting that this is a case of a shipper damaging his own cargo, which it is not. Therefore, we herewith set forth a concise statement of the facts as found by both courts below.

As a member-shipper of respondent Inland Waterways Shippers Association, a non-profit pool-shipping association of shippers in the Houston, Texas, area (R. 45), respondent L. B. Foster Company employed respondent Association at Houston to arrange transportation of certain newly-purchased pipe from the manufacturer's plant in Youngstown, Ohio, to respondent Foster's plant in Houston (Fdg. R. 141). All shipping arrangements, including affreightment of this pipe by petitioner from Pittsburgh, Pa., to Houston as common carriage by water and not as towage or under charter arrangement, were made by respondent association, which was billed and in turn billed respondent Foster (Fdg. R. 139, 141). Neither of the respondents had any docks or loading facilities for

water carriage in Pittsburgh, nor did petitioner. When a shipper had no loading terminal in Pittsburgh, petitioner would notify Marion Coal and Transfer Company, whose loading terminal was opposite petitioner's fleet at the river in Pittsburgh and who would then contact the shipper and arrange to act as stevedore (Fdg. R. 139-140). Consequently, the pipe was loaded into railroad cars at the Youngstown mill and these railroad cars were moved to the dock of this stevedore, where petitioner placed its barge to be loaded (Fdg. R. 141). This stevedore loaded this pipe into petitioner's barge, together with other cargo consigned to the respondent association in Houston (Fdg. R. 141). Petitioner prepared and issued its loading diagram showing the stowage plan of cargo aboard its barge (Pltf's. Ex. 12 at R. 77; Fdg. R. 141-142) and also issued its straight bill of lading containing "Shipper's load, weight and count" terminology through to Houston, although petitioner employed another water carrier to transport this barge beyond New Orleans (Pltf's. Ex. 11 at R. 75; Fdg. R. 141). While en route, petitioner stopped its barge at Owensboro, Kentucky, where additional cargo consigned to respondent association was loaded by Green River Steel according to petitioner's bill of lading, but petitioner's loading diagram does not show where this additional 96,820 pounds of iron or steel billets were stowed. Upon arival of petitioner's barge at Houston, the cargo was unloaded by another stevedore and this pipe was delivered to respondent Foster's plant by railroad, where the damage was discovered. Both courts below found, and petitioner admits, that this damage resulted from improper stowage of the cargo aboard petitioner's barge; specifically, the stevedores placed heavy steel billets upon this hollow pipe at Pittsburgh (and perhaps also at Owensboro) without sufficient dunnage, thereby allowing the billets to dent the pipe walls while en route.

Petitioner asserts (pp. 4-5) that "Marion is an independent terminal operator having no connection with Valley by stock ownership, directors, officers, employers (sic), or otherwise." This bald assertion is completely unsupported by the record or the findings below. As stated above, the record does show petitioner's practice to secure employment of Marion as stevedore and both courts below so found. And the record also shows that under Section 3 of its tariff petitioner offers to employ Marion on behalf of the shipper, to bill the shipper for Marion's charges, and even lists Marion's stevedoring charges (S. R. 2-3). Therefore, we suggest that it can hardly be said that there is no connection between Marion and petitioner.

Among the omissions in petitioner's statement is the fact that petitioner's own witness testified that proper loading of a barge is of the utmost importance (R. 109-113); that improper loading can result in a barge standing on end or buckling (R. 112) and can easily result in the placing of too great a stress upon a portion of a barge (R. 113). Items Nos. 510, 520 and 440 of petitioner's tariff (S. R. 1-2) recognize that improperly loaded cargo could shift while a barge is en route (causing an uneven draft or insufficient freeboard) and impose a standard of proper loading and stowage for the safety and security of petitioner's barges and tows. Stowage is also important so that cargo can be unloaded or additional cargo loaded en route and so that a subsequent voyage may be arranged to commence after delivery of certain cargo; petitioner was quite concerned that no cargo destined for Beaumont be loaded on barge MV-618 by the stevedores (S. R. 3). As stated by the Court of Appeals, 289 F. 2d 374, 381 (p. 13a of petition): "In the record before us there was evidence that Valley was much concerned with the supervision and problems of proper loading and stowage."

Petitioner has also neglected to mention that for transporting this pipe as common carriage, the shipper paid petitioner's highest rate under its tariff, the "A" rate (R. 78). This is the rate petitioner calls its "insured rate" (S. R. 9). It should further be noted that, under all of its rates, petitioner disclaims liability for improper stowage of its barges. Therefore, even if the Interstate Commerce Commission could relieve petitioner of its statutory liability for improper stowage in return for a lower rate—which it clearly cannot do, as we point out in our argument—this is not such a case.

The foregoing are merely a few examples of why we find petitioner's statement wholly insufficient and inaccurate. Recognizing that this Court has often held that:

> ". . . A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error."

Graver Mfg. Co. v. Linde Co., 336 U. S. 271, 275 and cases cited therein, respondents are completely satisfied with the statements of facts, not by petitioner, but by both the District Court, 194 F. Supp. 819 (R. 139), and the Court of Appeals, 289 F. 2d 374 (p. 1a et seq. of petition), and are prepared to rely thereon without attempting to paint a more favorable picture for this Court.

REASONS FOR DENYING THE WRIT.

Petitioner does not present an important question of federal law which has not been, but should be, settled by this Court. Instead, petitioner is requesting this Court to radically change the existing, well-settled law and to emasculate federal legislation—a request which might

properly be presented to Congress, but not to this Court.

At the outset two factors must be clearly kept in mind. First, the petitioner was transporting this cargo as a common carrier by water, not under charter, private carriage or towing arrangement. Second, contrary to what petitioner asserts, this is not a case of the cargo owner's negligence in handling and stowing his cargo. The trial court and appellate court both found that the loading was performed by an independent stevedore. What petitioner is contending for is that a common carrier by water, when performing common carrier service, can relieve itself of its non-delegable duty both at common law and by statute to properly load and stow the vessel by the device of publishing a tariff declaring in effect that stevedores who load the vessel shall become the agents of the shipper and not the carrier; by further providing by tariff that under whatever rate the cargo moves, the carrier shall not be liable for faulty stowage or for faulty loading when not performed by the common carrier, and then in the case where a stevedore, as here, does the loading, issuing a shipper's load and count bill of lading, although the shipper never loaded. Such a devious method of the carrier of avoiding its obligation to stow and load, whether performed by itself or an independent stevedore, the Court of Appeals would not permit, nor have any courts ever permitted this.

The Loading, Stowage and Discharge of Cargo Was the Common-Law Duty of the Water Carrier.

The common law made the public carrier of goods by water absolutely responsible for their safe arrival unless loss or damage was caused by Act of God or of the public enemy or by the inherent vice of the goods or the fault of the shipper—**and** (even where the loss was caused by one of these) the carrier was not negligent or otherwise

at fault. **Gilmore & Black, The Law of Admiralty**, p. 119. The duty imposed by the common law upon water carriers was to transport goods from wharf to wharf, the carrier being required to receive the goods at shipside, load and stow same, and to deliver the goods upon a fit and customary wharf. **Gilmore & Black, The Law of Admiralty**, p. 13; **Isthmian Steamship Co. v. California Spray-Chemical Corp.**, 299 F. 2d 486, 488-489 (9 Cir., 1961). Even petitioner's tariff in question provided by Sec. 1: "The carrier shall be liable as at common law for any loss of or damage to the shipment herein described, except as herein provided" (S. R. 10).

The Harter Act Imposes a Non-Delegable Duty Upon Common Carriers by Water to Properly Load, Stow, Care for and Deliver Cargo.

In the year 1893, carriers by water, having gone to extremes in using exculpatory clauses in bills of lading, the Harter Act (27 Stat. 445, 46 U. S. C. A. 190-196) was enacted. It was designed to afford to cargo interests some protection and at the same time to encourage shipping by allowing liability to be avoided under certain circumstances (See **Gilmore & Black, The Law of Admiralty**, pp. 119-124), but not as to loading and stowing. The Harter Act imposes a non-delegable duty upon the common carrier by water to properly load and stow the cargo.

Section 2 of the Harter Act (46 U. S. C. A. 191), provides that it shall not be lawful to "insert in any bills of lading or any such shipping documents any covenant or agreement **whereby the obligations of the owner or owners of said vessel . . . to carefully handle and stow her cargo** and to care for and properly deliver same, **shall in any wise be lessened, weakened, or avoided.**" (Emphasis ours.) This section clearly recognizes the obligation which the common law casts upon the common carrier by water to

properly load and stow the cargo and prohibits any contract whereby this duty is attempted to be lessened, weakened or was avoided.

This Court has repeatedly held that the meaning of the Harter Act in this respect is perfectly clear and lucid, and that its purpose is to prevent a common carrier by water from avoiding its duty to properly load, stow, care for and deliver cargo. **The Delaware,** 161 U. S. 459, 470-474, 16 Sup. Ct. 516, 40 L. Ed. 771; **Calderon v. Atlas Steamship Co.,** 170 U. S. 272, 277-282, 18 S. Ct. 588, 42 L. Ed. 1033; **Knott v. Botany Worsted Mills,** 179 U. S. 69, 21 S. Ct. 30, 45 L. Ed. 90; **The Germanic,** 196 U. S. 589, 25 S. Ct. 317, 49 L. Ed. 610; **Schnell v. The Vallescura,** 293 U. S. 296, 305-306, 55 S. Ct. 194, 79 L. Ed. 373.

Section 1 of the Harter Act (46 U. S. C. A. 190), declares it unlawful to insert in bills of lading or shipping documents any clause, covenant or agreement relieving the carrier "for loss or damage arising from negligence, fault or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge" and any such clauses are declared null and void.

Thus, the Harter Act imposes a non-delegable duty upon the common carrier by water to properly load and stow the cargo aboard its vessel. **The Germanic,** 124 Fed. 1, 2 (2 Cir., 1903):

> "It is plain that by virtue of this section a carrier cannot avoid liability for negligence in the loading, stowage, custody, care and delivery of merchandise."

This Second Circuit decision was affirmed by this Court, 196 U. S. 589, 25 S. Ct. 317, 49 L. Ed. 610, and in affirming, Justice Holmes commented at 196 U. S. 597:

"The claimant sets up the (Harter) Act and relies upon it. Under the cases, it must take the burdens with the benefits, and no discussion of the terms of the bills of lading, if they might lead to a greater limitation of liability, is necessary. **Knott v. Botany Mills**, 179 U. S. 69; **The Kensington**, 183 U. S. 263, 269."

That the Harter Act clearly does not permit the carrier to avoid its non-delegable duty to load and stow is clearly stated in **The Willdomino**, 300 Fed. 5, 9-10 (3 Cir., 1924), aff'd **S. S. Willdomino v. Citro Chem. Co.**, 272 U. S. 718:

"To meet the ever increasing attempts further to limit the liability of the vessel and her owners by inserting in bills of lading stipulations against losses arising from unseaworthiness, **bad stowage**, negligence, and other causes of liability by which the common-law responsibility of carriers by sea was being frittered away the Harter Act . . . was passed. It was designed to fix the relations between the cargo and the vessel and to prohibit contracts restricting the liability of the vessel in certain particulars. **The Delaware**, 161 U. S. 459, 16 Sup. Ct. 516, 40 L. Ed. 771. By the first section of that act contractual clauses whereby the carrier 'shall be relieved from liability for loss or damage arising from negligence, fault, or **failure in proper loading, stowage**, custody, care, or proper delivery' of any of the cargo are made null and void, while the last clause of the second section makes unlawful any agreement 'whereby the obligations of the master, officers, agents, or servants to carefully handle and stow her cargo and to care for and properly deliver same, shall in any wise be lessened, weakened, or avoided.' These two sections, in their general purport, so far as respects the care and

delivery of the cargo, are not essentially different. **Calderon v. Atlas Steamship Co.**, 170 U. S. 272, 277, 18 Sup. Ct. 588, 42 L. Ed. 1033." (Emphasis ours.)

What the Harter Act prohibits the carrier to do is exactly what petitioner has attempted to do: namely, avoidance of liability for improper stowage of cargo aboard its vessel by inserting in the tariff the exculpatory language in question [Sections 10 (a) and 11 (e) of its tariff at S. R. 13-15] and by placing the same wording in its bill of lading. By the terms thereof, petitioner disclaims liability for improper loading or stowing under whatever rate it carries a shipper's merchandise. As stated by the Court of Appeals in this case, this exculpatory language "flies in the very teeth of the prohibition of the Harter Act" (289 F. 2d 374, 381; pp. 12a-13a of Petition). Petitioner tries to make the stevedores in Pittsburgh and Owensboro the agents of the shipper, but since it is the non-delegable duty of a ship to load in the case of common carriage, this device is likewise unsuccessful, and the Court of Appeals so held (289 F. 2d 374, 382; p. 15a of Petition).

The Harter Act Applies to Common Carriage on Inland Waterways by Means of Towboats and Barges.

The Harter Act has long been held to apply to common carriage by means of towboats and barges with exactly the same force as it applies to the largest ocean-going ships. **Rooks v. Elliott & Watrous**, 65 F. Supp. 325; **The Bathgate**, 25 F. 2d 103 (3 Cir., 1928), cert. den., 277 U. S. 589; **In re O'Donnell**, 26 F. 2d 334 (2 Cir., 1928). As this Court stated in the leading case of **Sacramento Navigation Co. v. Salz**, 273 U. S. 326, 330, 47 S. Ct. 386, 71 L. Ed. 644 (1927), in referring to the applicability of the Harter Act to merchandise transported in an unmanned barge propelled by a towboat in common carriage:

> "In light of the decisions presently to be noted, the words, 'a vessel transporting merchandise' etc., are entirely appropriate to describe the combination now in question, and we see no reason to think that Congress intended that they should not be so applied."

In fact, under circumstances subsequently held to constitute towage, petitioner has urged the courts to find a towing contract to be affreightment so as to entitle petitioner to the benefits of the Harter Act. **Mississippi Valley Barge Line Co. v. T. L. James & Co.**, 144 F. Supp. 662.

Exculpatory Clauses in Derrogation of the Harter Act Cannot Be Validy Embodied in a Tariff.

Inclusion of petitioner's void exculpatory clauses in its tariff does not make such clauses binding upon the shipper or the courts. As we have shown, the Harter Act imposes upon common carriers by water the non-delegable duty of loading and stowing cargo and declares agreements in avoidance of this duty to be void and illegal. Petitioner nevertheless argues that these exculpatory clauses are contained in its tariff filed with the Interstate Commerce Commission and that, therefore, these void exceptions are valid until action is taken to have the Commission disapprove them. As its sole authority for this rather preposterous argument, petitioner cites **Southwestern Sugar & Molasses Co., Inc. v. River Terminals Corp.**, 360 U. S. 411, 79 S. Ct. 1210, 3 L. Ed. 1334 (1959), which involved towage and not common carriage (as here) and which also shows the invalidity of petitioner's argument. For as Justice Harlan pointed out in that case, the Interstate Commerce Commission is without authority to affect the liability of water carriers engaged in common carriage (Footnote 6 at 360 U. S. 417); and if provisions

in tariffs filed with the Interstate Commerce Commission are in derogation of the Harter Act, they are invalid nevertheless and no recourse need first be had to the Commission before the courts may so hold (Footnote 9 at 360 U. S. 420).

The **Southwestern Sugar** case involves an exculpatory clause in a **towage contract** embodied in a tariff. Before considering its validity, Justice Harlan first pointed out that common carriage was not involved, 360 U. S. 416-417, carefully noting that the Interstate Commerce Commission is without authority to affect the liability of common carriers by water. Footnote 6 at 360 U. S. 417.

The Interstate Commerce Commission acquired authority over water carriers by virtue of Part III of the Interstate Commerce Act, 49 U. S. C. A. 901 et seq. However, Section 920 (d) explicitly provides:

> "(d) Nothing in this chapter shall be construed to affect any law of navigation, the admiralty jurisdiction of the court of the United States, **liabilities of vessels and their owners for loss or damage,** or laws respecting seamen, **or any other maritime law, regulation or custom not in conflict with the provisions of this chapter.**" (Emphasis ours.)

Therefore, Justice Harlan made it quite clear at 360 U. S. 417-418 that while the Interstate Commerce Commission could affect the liability of a regulated **tower** involved in **Southwestern Sugar,** the Commission was specifically deprived of authority by Congress to affect the liability **of a common carrier by water**—the capacity in which petitioner was acting in this instance. In fact, footnote 5 of the Court's opinion at 360 U. S. 416-417 demonstrates that provisions specifically declared illegal by Congress, even if contained in a carrier's duly filed tariff, are nonetheless void:

"5 Compare **Boston & Maine R. Co. v. Piper**, 246 U. S. 439, 445, where this Court held a limitation of liability clause void although filed as part of a tariff with the I. C. C. by a rail carrier, saying that: 'While this provision was in the bill of lading, the form of which was filed with the Railroad Company's tariffs with the Interstate Commerce Commission, it gains nothing from that fact. The legal conditions and limitations in the carrier's bill of lading duly filed with the Commission are binding until changed by that body (citation) . . . but not so of conditions and limitations which are, as in this one, illegal, and consequently void.' The decisive difference between **Piper** and this case is that there the exculpatory clause was specifically declared illegal by the Interstate Commerce Act itself. See 49 U. S. C., § 20 (11)."

Apparently anticipating that water carriers might attempt to use the **Southwestern Sugar** opinion as a basis for tariff exemptions relieving them from statutory obligations when acting as common carriers by water, Justice Harlan carefully qualified the Court's opinion (360 U. S. 419-420):

"If the peculiar hazards involved in towing a barge supplied by the shipper are great, and the methods of guarding against those hazards uncertain, it may be that in an area where Congress has not expressly or by fair implication declared for a particular result, the federal courts should creatively exercise their responsibility for the development of the law maritime to fashion a particularized rule to deal with particularized circumstances.[9]

[9] "**Congress has in some instances declared by statute** the circumstances under which carriers may contract for release from or limitation of liability, or **rules governing the liability** or exemption from lia-

bility **of carriers irrespective of contract.** See 46 U. S. C. 181-196, 1300-1315 (water carriers) * * * **Where such statutes apply of course no agreement in derogation of them, even if embodied in a tariff, is valid.** See, e. g., **Adams Express Co. v. Croninger,** 226 U. S. 491; **Boston & Maine R. Co. v. Piper,** supra." (Emphasis ours.)

Petitioner's argument that the tremendous growth of transportation of merchandise in common carriage by barges on the Mississippi River makes it impossible for the common carrier to supervise the stowage of cargo is an argument that might appropriately be presented to a congressional committee considering an amendment to the Harter Act but not to the courts. The Harter Act has long been held to apply to common carriage by means of towboats and barges; and no common carrier on our inland waterways—least of all, the petitioner in this case—has ever suggested that the Harter Act is not applicable to such common carriage. Nor is there even a single case to be found where a common carrier by means of towboats and barges or otherwise ever successfully contended that its obligation to properly load and stow could be shifted to the shipper. No such case is cited by petitioner. Instead, petitioner goes completely outside the record on pages 8-9 of its petition to present its version of modern inland waterways water carriage and to argue that today's water carrier should not be charged with the duty of properly loading and stowing cargo. However, petitioner omitted mentioning that most river transportation involves mere towage (which is not subject to the Harter Act) rather than common carriage, as pointed out by Justice Frankfurter in footnote 14 of his dissenting opinion in **Bisso v. Inland Waterways Corp.,** 349 U. S. 85, 117-118. The fact that petitioner owns no loading facilities at Pittsburgh or various other places does not affect this

case. What water carrier, whether by barge, steamboat or ocean-going vessel owns loading terminals at all ports of call? The facts that loading is done by stevedores today and that, directly or indirectly, the shipper pays the cost of stevedoring have never been held to relieve the common carrier by water from its obligations under the Harter Act to properly load and stow cargo aboard its vessel. Moreover, it is the common carrier, not the far-distant shipper, who is in a position to exercise control over the stevedore and to insist upon proper stowage. This was petitioner's duty under the Harter Act and it has properly been held liable for its failure. **Schnell v. The Vallescura**, 293 U. S. 296, 305-306. To paraphrase Justice Holmes in **The Germanic**, 196 U. S. 589, 598, petitioner finds itself in the position of the little boy who wishes to have his cake and also eat it; petitioner wishes to act as a common carrier by water, charging common carriage rates, and also to limit its liability to that of a mere tower. If petitioner desired to avoid the obligations of a common carrier subject to the Harter Act, petitioner should have chartered its barge to respondents and charged only towage rates, as was done in the **Southwestern Sugar & Molasses** case, supra.

The argument is advanced at p. 12 of the Petition that this shipment moved under the higher "A" rate; that thereunder the carrier, by the terms of its bill of lading, assumed obligations beyond its legal duty under the third section of the Harter Act, 46 U. S. C. A., § 192; and that consequently, it is argued, petitioner could avoid its obligation to load and stow under the first and second sections of the Harter Act, 46 U. S. C. A., §§ 190-191. This argument has no validity. In the first place, the Harter Act does not grant the common carrier the option of declining its benefits and avoiding its burdens. In the second place, whether a shipment moves under the higher

"A" rate under Section 10 of petitioner's tariff (S. R. 13-14), or under the lower "B" rate under Section 11 (S. R. 14) where all Harter Act benefits are accepted by petitioner, petitioner's tariff and bill of lading attempt to relieve it from its common carrier's obligation to load and stow under all rates. The third section of the Harter Act, 46 U. S. C. A., § 192, sets forth the risks to which the carrier **may** limit its liability, but not as to what it **must** limit them. Therefore, if in consideration of a higher rate the common carrier wishes to forego certain of its statutory exemption, there is nothing to prevent it from so doing. But when it comes to loading and stowing, the first and second sections of the Harter Act, 46 U. S. C. A., §§ 190-191, are not enabling, but **mandatory**. These sections specifically prohibit the insertion of the clauses as they appear in petitioner's tariff and bill of lading which relieve it from its duty either by itself or through the use of stevedores to properly load and stow.

The very evil which the Harter Act sought to remedy was the water carrier's shifting of liability for damage caused by improper loading and stowage upon the shipper. **The Delaware**, 161 U. S. 459, 471-474. If this liability could be shifted by the device of filing an exculpatory tariff or by issuing a shipper's load and count bill of lading, there would be a plethora of decisions so holding. Petitioner cannot cite even one. Moreover, if petitioner could thus avoid its liability, a shipper would have to sue stevedores in as many different jurisdictions as there were loadings, trying to establish which stevedores were responsible for the damage. And if petitioner could thus avoid its liability for improper loading and stowage, so could not only all common carriers on all our rivers, but also common carriers on all inland waters, including the Great Lakes, and all ocean carriers transporting property between ports of the United States, for

the Harter Act, by its very terms, treats uniformly all common carriage by water between ports of the United States.

The Federal Bill of Lading Act Does Not Authorize Common Carriers by Water to Foist the Duty of Proper Stowage Upon Shippers.

Petitioner argues (p. 11 of its Petition) that the obligation of safe stowage may be shifted by a water carrier to the shipper by means of a "shipper's load and count" bill of lading pursuant to 49 U. S. C. A., 101. Petitioner complains that the Court of Appeals summarily rejected its unique argument because such avoidance of the obligation of safe stowage "flies in the very teeth of the provisions of the Harter Act."

As pointed out above, the Harter Act imposes a non-delegable duty upon the common carrier by water to properly load, stow, care for and deliver cargo.* Petitioner's argument that the Federal Bill of Lading Act, enacted in 1916, "legislatively qualifies" the Harter Act so as to permit a water carrier to shift the obligation of safe stowage to the shipper would probably shock the many courts that have upheld the Harter Act since 1916 and, indeed, must come as a surprise to this Court which in 1939 declared:

> "Here the stipulation was for exemption from liability for a particular kind of injury—decay. But the decay of a perishable cargo is not a cause; it is an effect. It may be the result of a number of causes,

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* In addition to the decisions of this Court heretofore cited, see also *The Fernchiff*, 22 F. Supp. 728 (D. Ct. Ind., 1938); *Bethel v. Melon & Kittenhouse Co.*, 131 Fed. 129 (D. Ct. Pa., 1904); *Mackey v. United States*, 83 F. Supp. 14 (D. Ct. N. Y., 1948); *Norpac Trading Corporation v. The Mathilda Thorden*, 173 F. Supp. 23 (D. Ct. Pa., 1959).

for some of which, such as the inherent defects of the cargo, or, under the contract, sea peril making it impossible to ventilate properly, the carrier is not liable. For others, such as negligent stowage, or failure to care for the cargo properly during the voyage, he is liable. The stipulation thus did not add to the causes of injury from which the carrier could claim immunity. It could not relieve him from liability for want of diligence in the stowage or care of the cargo." 293 U. S. 305-306.

The foregoing statement was by Justice Stone in the case of **Schnell v. The Vallescura,** 293 U. S. 296, 305-306, 55 S. Ct. 194, 79 L. Ed. 373 (1939). There is certainly nothing in the legislative history of the Federal Bill of Lading Act which even remotely suggests that Congress thereby intended to repeal the Harter Act requirement that common carriers by water are responsible for proper stowage. The purpose of the Federal Bill of Lading Act was to promote the negotiability of bills of lading by protecting holders in good faith. See Annotations to 49 U. S. C. A., § 81. It is stated at 53 Congressional Record 3934 that the purpose of Sections 20 and 21 of the Federal Bill of Lading Act was to **reduce**—not to enlarge—the carriers' right to mark bills of lading "Shipper's Load and Count" because of the abuses that had arisen.

The Federal Bill of Lading Act does not even suggest that a common carrier by water can avoid its duty to properly load and stow. Sections 20 and 21 of this Act (49 U. S. C. A., Sections 100-101) do not even imply that "Shipper's weight, load and count" should apply when the carrier is required by law to load and stow.

The Federal Bill of Lading Act and the Harter Act are entirely compatible until petitioner attempts to read into the Federal Bill of Lading Act permission to avoid its

non-delegable duty to properly load and stow by delegation to the shipper. **Gardner v. The Danzler**, 281 F. 2d 719 (4 Cir., 1960):

> "It is a cardinal principle of construction that repeals by implication are not favored. When there are two acts upon the same subject, the rule is to give effect to both if possible. . . . The intention of the legislature to repeal 'must be clear and manifest'. . . . It is not sufficient, as was said by Mr. Justice Story in Wood v. United States . . . 'to establish that subsequent laws cover some or even all of the cases provided for by (the prior act); for they may be merely affirmative, or cumulative, or auxiliary.' There must be 'a positive repugnancy between the provisions of the new law, and those of the old; and even then the old law is repealed by implication only *pro tanto* to the extent of the repugnancy' . . ." (Citations omitted. l. c. 724.)

There is no such repugnancy here, because the Federal Bill of Lading Act does not even purport to relieve the common carrier by water from the duties imposed by the Harter Act. As a matter of fact, the Harter Act contains its own provision as to bill of lading provisions concerning weight and apparent good order, 46 U. S. C. A., § 193, which provides:

> "§ 193. Bills of lading to be issued; contents.
>
> It shall be the duty of the owner or owners, masters, or agent of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to issue to shippers of any lawful merchandise a bill of lading, or shipping document, stating, among other things, the marks necessary for identification, number of packages, or quantity, stating whether it be carrier's or shipper's weight, and

apparent order or condition of such merchandise or property delivered to and received by the owner, master, or agent of the vessel for transportation, and such document shall be prima facie evidence of the receipt of the merchandise therein described. Feb. 13, 1893, c. 105, § 4, 27 Stat. 445."

CONCLUSION.

When acting as a common carrier by water and performing public carriage of merchandise (rather than mere towage), petitioner is subject to all of the laws applicable to common carriage by water, including the Harter Act. It is well-settled law that the Harter Act applies to common carriers by water using barges and towboats to transport cargo. Under the Harter Act, it is clear that the stevedores are the agents of the carrier or vessel in performing loading and stowage; this non-delegable duty cannot be circumvented by "agreement" that the stevedores shall be the agents of the shipper. While petitioner is entitled to require the shipper to pay the stevedores, the Harter Act prohibits petitioner from exculpating itself of liability for proper loading and stowage of its vessel. Clauses in petitioner's bill of lading exculpating petitioner from liability for improper stowage are void under the Harter Act. The Interstate Commerce Commission is clearly without authority to modify the liabilities of common carriers by water for cargo damage, and this Commission cannot repeal the Harter Act. It is equally well settled that tariff provisions in derogation of express Congressional legislation are invalid; therefore, petitioner's exculpatory provisions in derogation of the Harter Act, even though embodied in a tariff filed with the Interstate Commerce Commission, are illegal and void.

It is therefore respectfully submitted that the decision of the Court of Appeals for the Eighth Circuit is correct.